The plaintiff and the other purchasers represented by it also ask for a mandatory injunction compelling the KLCCH to pay the plaintiff and the other purchasers it represents such difference as referred to in prayer 1. In my opinion, the prayers stated in the statement of claim are beneficial to the plaintiff and all the other purchasers represented by it.

In my judgment the plaintiff and those represented by it have satisfied all the three requirements which are necessary in a representative action.

For the reasons stated above, I dismiss all the four applications filed by the first, second, third and fifth defendants with costs. The eighth defendant did not make any submission before me in support of the fifth application. In fact the fifth application was never argued at all. I therefore make no order in respect of the fifth application.

Order accordingly.

Solicitors: *Sri Ram Zulkifly & Kumar; Shearn Delamore & Co.; Ariffin & Partners; Chooi & Company; Albar Zulkifly and Yap; Kam Woon Wah; Shook Lin & Bok; Zain & Company.*

HO SIM PAT v. CHANG AH NGI & ANOR.

[O.C.J. (Wan Yahya J.) July 7, 1986]

[Malacca — Originating Summons No. 76 of 1984]

Land Law — Mortgage of customary land in 1942 — Occupation of mortgaged land by mortgagee — No repayment of principal or interest of mortgage debt since 1943 — Limitation — Whether right of mortgagee extinguished — National Land Code (Penang and Malacca Titles) Act 1963, ss. 24, 53, 88(1), 99 & 102(1) & (2) — Malacca Lands Customary Rights Ordinance (Cap. 125), ss. 24 & 30 — Limitation Act 1953, ss. 9 & 16.

During the Japanese Occupation of Malaya and precisely on September 21, 1942, the plaintiff mortgaged his land in Malacca to Chang Syoh Ku, as security for repayment on September 2, 1943 of a loan of $1,500 at 14% p.a. interest. The mortgage was duly registered. Ever since 1942, the mortgagee and his family had been in occupation of the land and until this date neither the repayment of the loan nor the payment of interests have been made by the plaintiff. The present defendants were the administrators of the estate of the mortgagee who died in 1971.

The plaintiff claimed for a declaration that the estate or interest of the mortgaged land be extinguished and that the mortgage be discharged or extinguished.

Held, dismissing the application: (1) land subject to the former Malacca Lands Customary Rights Ordinance and entered in the Mukim Register, like the present land, cannot be entered into the Interim Register and will be subjected to the provisions of Parts I, II, VIII, IX and X of the National Land Code (Penang and Malacca Titles) Act 1963 ("the Act") only. Time limit laid down under section 88 of the Act comes under Part VII and therefore does not apply to customary land;

(2) as the limit laid down under the said section 88 will not apply to customary land, it is open to the mortgagee, before the issuance of his title in continuation and its subsequent registration in the Malacca Customary Land Register, to present his claim of pre-existing interest to the Commissioner under section 53;

(3) by virtue of Part VIII of the Act, the mortgage in this case is deemed to be duly registered under the National Land Code;

(4) limitation period will not apply to the National Land Code (Penang and Malacca Titles) Act 1963 or to a proprietor registered under the same Act;

(5) the plaintiff's application failed because the right of the defendants as administrators to the mortgagee in possession has not yet been extinguished and still subsists and because the plaintiff's right to redeem his land has been barred by section 16 of the Limitation Act.

[*Editorial Note:* The appeal against the High Court's decision in this case did not materialize due to want of leave to appeal, and was accordingly dismissed on May 4, 1987 by the Supreme Court (S.C.C.A. No. 326 of 1986: Seah, Mohamed Azmi and Abdoolcader S.C.JJ.)]

ORIGINATING SUMMONS.

A.C. Vohrah for the applicant.

Lee Kong Fee for the respondents.

Cur. Adv. Vult.

Wan Yahya J.: During the Japanese Occupation of Malaysia and precisely on September 21, 1942, Ho Sim Pat, the plaintiff herewith, mortgaged his land EMR 347, Balai Panjang (now known as Lot Nos. 648 and 650) Malacca to Chang Syoh Ku, as security for repayment on September 2, 1943 of a loan of $1,500 (occupation currency) at 14% p.a. interest. The mortgage was duly registered. Ever since 1942, Chang Syoh Ku (mortgagee) and his family had been in occupation of the land and until this date neither the repayment of the loan nor the payment of the interests have ever been made by the plaintiff. The present defendants are the administrators of the estate of the mortgagee who died in 1971.

The plaintiff by this originating summons now claims for a declaration that the estate or interest of the mortgaged land be extinguished and that the mortgage be discharged or extinguished. His counsel argues that the defendants should have

taken steps to recover the debt immediately after the moratorium period *i.e.* August 29, 1945 to September 30, 1949 as provided in the British Military Administration Moratorium Proclamation No. 5 dated August 29, 1945 and the Moratorium Proclamation (Repeal) Ordinance 1949. According to counsel, on October 1, 1949 the mortgagee could have availed himself of the remedies under sections 11(3), 11(5) and 11(7) of the Debtor and Creditor (Occupation Period) Ordinance 1948, and as the defendants had not done so within 18 months as stipulated under section 11(5), his remedies had been extinguished. However, counsel concedes that as the land is a Malay customary land and the Collector had made an endorsement, the mortgagee might have further remedies.

Counsel next contends that as the endorsement had been made under Part VIII of the National Land Code(Penang and Malacca Titles) Act 1963, the mortgagee should have made an application under section 53 of the said Act and as no application was made under this section within the 16 years period as stipulated in section 88(1) as extended by M.P.U. 8/78, the plaintiff's title had become indefeasible; and by reason of section 99 of the Act, the plaintiff had acquired a transferable right which had the effect of ousting the mortgagee from the land. This appears to be an erroneous contention as the mortgage was in fact registered under section 22 of the Malacca Lands Customary Rights Ordinance and not under the Act.

It may be helpful at this stage to examine generally the process of dealings in the land from September 21, 1942. The land was lawfully mortgaged on that date and the mortgagee went into occupation. On September 21, 1943 when repayment was due and no payment towards the principal or interest made, the mortgage subsists until September 6, 1945 when the occupation period ended with the Japanese surrender. From that date until September 30, 1949 all dealings in land were suspended by the British Military Administration Moratorium Proclamation No. 5. On October 1, 1949 after the repeal of this moratorium period *vide* Ordinance 37/49, the mortgagee could have issued notice under section 24 of the Malacca Lands Customary Rights Ordinance (Cap. 125) and applied for the land to be sold. The mortgagee did not elect to do so but continued to occupy the land. He was perfectly entitled to do so as there was nothing in the Malacca Lands Customary Rights Ordinance or in any other law which prevented him from continuing to occupy the land as a mortgagee in possession.

Indeed section 30 of the Ordinance made it clear that:

> "The registration of a mutation upon genuine transfer or transmission by the registered holder of customary land or of a mortgage shall be taken in all courts as conclusive evidence that the person named therein as registered holder or mortgagee thereof is absolutely and indefeasibly entitled to be registered as holder thereof, or as mortgagee thereof as the case may be. The title of such holder or mortgagee shall not be subject to be questioned except on the ground of fraud or misrepresentation to which he is proved to be a party, or on the ground of adverse possession."

Plaintiff's counsel has stated that the mortgagee's right as a mortgagee had been extinguished by the Debtors and Creditor (Occupation Period) Ordinance 1948, because he did not take the action spelt out in section 11 of the Ordinance within 18 months from the commencement of the Ordinance.

I am unable to accede to his views. For the purposes of this argument only, part of sections 11(1), 11(3) and 11(5) are reproduced below:

> "(1) In any case where *a debt purporting to have been discharged in whole or in part by payment in occupation currency*, is, by virtue of the provisions of this Ordinance, deemed to be partly undischarged, *and where the payment of such debt* before it purported to be discharged as aforesaid *was secured by a charge over property* movable or immovable and such charge has, or purports to have, been discharged by the chargee or by his agent or by the Custodian or a liquidation officer, such discharge shall (subject to the proviso next following) be void as against the chargor or his personal representatives and any person claiming through or under him or them, and the charged property shall stand charged with the revalued balance of the debt and interest, if any, accrued and unpaid and to accrue thereon:
>
> Provided that –
>
> (a) where the charged property is movable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a *bona fide* purchaser or chargee for value; or
>
> (b) where the charged property is immovable property and such property has, after its discharge or purported discharge as aforesaid, been transferred or charged to a *bona fide* purchaser or chargee for value without the intervention in the transaction of the Custodian or a liquidation officer;
>
> the discharge to the chargor by the chargee or his agent shall not be void as aforesaid, but the title of such *bona fide* purchaser or chargee for value, or any person claiming through or under him shall prevail against the title of the original chargee.

(3) *Where the rights of a creditor* in relation to any charge *have been deemed, by virtue of sub-section (1) of this section, not to have been extinguished,* the creditor may give notice in writing of not less than one month calling upon the debtor and any third party who furnished the security to reinstate or replace such charge and to execute all documents and do all acts necessary for that purpose.

(5) In any case where –

(a) the debtor or a third party who furnishes the security makes *default in complying with a notice given by a creditor* under sub-section (3) of this section; or

(b) the rights of any person appearing from the Register to be purchaser or *chargee* who purchased or *advanced money on or after the date of the purported discharged* will be affected by the reinstatement of a security; or

(c) any difference or *dispute* has arisen *touching* the reinstatement of any *security* under this section;

the creditor or the debtor or any person interested may within eighteen months from the commencement of this Ordinance apply to the High Court by way of originating motion or summons for such relief as the nature of the case requires; and the court may determine any claim by any person to be a *bona fide* purchaser or chargee for value within the proviso to sub-section (1) of this section and may make an order that the security shall not be reinstated or may make an order for the reinstatement of the security or its replacement with other security for such amount as may be specified in the order, or may make such further or other order as to the court shall seem fit, and may direct that the Register shall be rectified accordingly."

(emphasis added)

Sub-section (1) of section 11, as I read it, applied only in specific cases where a debt has been wholly or partly discharged in occupation currency and where the payment of that debt was secured by a charge over property which has been discharged. In the case before us, no payment was made at all in whatever currency and therefore there was no question of discharge having not been applied for or made.

Similarly, sub-section (3) has no application in our present case as it is also enacted with reference to rights of a creditor deemed to have been extinguished by virtue of sub-section (1). In sub-section (5), the 18-month period applies only in the case (a) where there has been a default by a debtor to a notice given by the creditor, (b) of the rights of purchaser or chargee who purchased or advanced money on or after the purported discharge and (c) of difference or dispute on the reinstatement of the security.

In our present case, no notice had ever been issued and the mortgagee was not a chargee who advanced money after purported discharge; and no dispute had yet arisen between them on security. As the 18 months relate only to the circumstance mentioned in (a), (b) and (c) above, it has no application at all to our present case.

In my view, with the exception of the specific and isolated provision of section 11(5) as discussed earlier, the Debtor and Creditor (Occupation Period) Ordinance 1948 is not enacted with the object of placing a time period within which all rights and claims made during the occupation period must be claimed. On the contrary, this law was intended to provide a mode of valuation in Malaysian currency in respect of unsatisfied occupation debts incurred in the occupation currency. If this is not the case, then the Ordinance should have been revoked after 18 months of its enactment. The Malacca Lands Customary Rights Ordinance is repealed by section 96 of the National Land Code (Penang and Malacca Titles) Act 1963. As a result of this, the holders of customary land shall cease to hold their customary lands in accordance with their repealed ordinance but shall continue to do so subject to and in accordance with Part VIII of the Act of the National Land Code.

Section 102 then went on to outline the procedures to be followed in transforming the former E.M.R. land into the Malacca Customary Land Register as follows:

"(1) *Subject to this section,* the Mukim Register kept under the Ordinance shall continue in existence after the appointed day, but shall be known as the Malacca Customary Land Register.
(Emphasis is mine)

(2) As and when it is expedient to do so, the Collector shall prepare and issue documents of title, under the National Land Code in continuation of the titles entered in the Malacca Customary Land Register and, in doing so, shall follow as nearly as may be the procedure prescribed by the National Land Code in respect of land held on a Mukim grant for the issue of final title in continuation of final title to land as a whole:

Provided that –

(a) Sections 166 to 169 of the Code shall not apply; and

(b) no fee shall be chargeable."

In my opinion, sub-section (1) is not intended to operate as an automatic transfer of land registered under the Mukim Register into the Malacca Customary Land Register immediately on the appointed day. The phrase "subject to this section" is intended to clarify that the holdings in

the Mukim Register will eventually be placed on the Malacca Customary Land Register when other provisions of section 102, particularly sub-section (2) thereof have been complied with. Until then a E.M.R. holding will be continued to be referred to as such until the Collector has had the opportunity to prepare and issue a replacement title in the Malacca Customary Land Register. Indeed, we have just been told by the Collector that this is the practice in the Land Office and that some holdings have been issued with Malacca Customary Land Register titles whilst the remaining 6,000 or so are still awaiting the processing under sub-section (2) of section 102. This intention of the legislature is also elucidated in section 99(2)(c) in which it is provided that in the application of the National Land Code to customary land, the Malacca Customary Land Right (M.C.L.R.) shall be deemed to be a Mukim Register.

It is obvious from the above as well as the Collector's evidence, the land in the present case is a customary holding registered under the Mukim Register. Until such time as the Collector deem it expedient to process it, the holding will remain as an E.M.R. land. In the meantime, all dealings with E.M.R. land can be registered in accordance with sub-section (3) of section 102 and such registration shall be as effective as a registration under the National Land Code.

Pausing here for a moment, I shall now deal with plaintiff's counsels contention on section 53 of the Act. According to him, within 16 years after the appointed date (section 88(2) as extended by M.P.U. 8/78) the mortgagee had to make his claim pursuant to section 53. Failure to do so will lead to the extinguishment of any of his pre-existing rights over the land. Thereafter the land will become indevisable. I am unable to agree with learned counsel on this point for two reasons. First section 24 of the Act expressly excluded the application of section 88, which is under Part VII of the Act, in the following terms:

"No land or holding which immediately before the appointed day was subject to the provisions of the Malacca Lands Customary Rights Ordinance or to any title by entry in the Mukim Register kept under section 15 of that Ordinance, to any mutation in title to such customary rights, shall be entered in the Interim Register, and no provisions of this Act, other than the provisions of this section and of Parts I, II, VIII, IX and X, shall apply to any such land or holding."

It is clearly noticeable from the above that a land subject to the former Malacca Lands Customary Rights Ordinance and entered in the Mukim Register, like our present land, cannot be entered into the Interim Register and will be subjected to the provisions of Parts I, II, VIII, IX and X only. As stated above, section 88 comes under Part VII, the provisions of which are not intended to apply to customary land.

Secondly, as regards counsel's argument on section 53, I am of the view that the *ad hoc* amendments in section 53(4) can only arise when there is a dispute as to the proprietorship. As the time limit laid down under section 88 will not apply to customary land, it is open to the mortgagee, before the issuant of his title in continuation and its subsequent registration in the Malacca Customary Land Register, to present his claim of pre-existing interest to the Commissioner under section 53.

Now, reverting to the position of the land, once again, on the appointed day the land, as mentioned earlier, remained as a customary land under the Mukim Register but then what is the position of the mortgage registered by the mortgagee in 1942? The situation can be ascertained by reference, first to section 24 (*supra*) which states, *inter alia,* that Part VIII and not Part VII is applicable to customary land. This point is again repeated in section 99(1)(b) which specifies that on or after the appointed day the customary land shall be held in accordance with "this Part" *i.e.* Part VIII of the Act. Now Part VIII itself contains a specific saving provision for pre-existing mortgages which reads:

"Upon the appointed day every pre-existing charge by way of legal mortgage of any customary land, duly registered under the provisions of the Ordinance shall be *deemed* to be a charge duly registered under the provisions of the National Land Code:

Provided that –

(a) subject to the provisions of paragraph (b), every such charge shall continue to be subject to all the express and implied conditions thereof subsisting immediately before the appointed day;

(b) notwithstanding any express or implied condition referred to in paragraph (a), the provisions of the National Land Code shall apply to the discharge of any such charge and in relation to any remedies of the chargee thereunder;

(c) notwithstanding the provisions of the National Land Code, it shall be an implied condition of any charge deemed to be registered under the provisions of this section that no chargee or other person shall have any right to enter into possession thereunder if he is not competent to hold such land under the provisions of this Part."

By virtue of the above, the mortgage registered by the mortgagee in 1942 is *deemed* (my emphasis) to be a duly registered charge under the National Land Code.

It would appear under section 103(c) that the defendants may not now be a competent person to hold the land and therefore cannot occupy it as a chargee in possession but that provision will not extinguish his presumed rights or remedies as a chargee under the National Land Code. Alternatively, as a customary land will not become indefeasible until the name of its proprietor has been entered on the Malacca Customary Land Register in accordance with section 102(2) or pursuant to a decision made by the Land Titles Appeal Board or the court (see proviso to section 99), the defendants as administrators of the mortgagee's estate are still within their rights to present their claim under section 53.

Another point of law raised in objection against this application is based on the limitation of redemption action on the plaintiff for failure to redeem the land within the 12-year period (as specified in section 16 of the Limitation Act) from the mortgagee who was, at all times, a mortgagee in possession. The plaintiff's counsel's argument against this is that section 16 of the Limitation Act 1953 (Act 254) will not apply to this land as it fell under the exemption spelt out in sub-section(2) of section 9 of the same Act. Now sections 9 and 16 read as follows:

"9.(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

(2) Nothing in this section or in section 11(2) of this Act shall be deemed to affect the provisions of the Government Proceedings Ordinance 1956, or the National Land Code (Penang and Malacca Titles) Act 1963, or to apply –

(a) to the ruler of any state, in respect of state land or land reserved for a public purpose situate in such state; or

(b) to any person registered under or by virtue of the provisions of the National Land Code 1965, or the National Land Code (Penang and Malacca Titles) Act 1963, as the proprietor of the land sought to be recovered, or to any person claiming through a person so registered, except to the extent that such Code or Act so provides or permits.

16. When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him:

Provided that where a mortgagee is by virtue of the mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges in accordance with the provisions of section 27 of this Act the title of mortgagor, or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgement."

My understanding of section 9(2) is that, limitation period will not apply to the National Land Code (Penang and Malacca Titles) Act 1963 or to a proprietor registered under the same Act. The right claimed by the defendants is not based on the Act but on a mortgage registered under the Malacca Lands Customary Rights Ordinance (Cap. 125) and similarly with reference to sub-section 2(b), neither is the plaintiff herein a person registered as a proprietor of the land by virtue of the Act or the National Land Code. As indicated earlier, this land, as well as the other 6,000, still remains as E.M.R. land until such time as the Collector has had the opportunity of processing it under section 102(2) of the Act.

On the other hand, section 16 makes express mention of 'mortgage', 'mortgagee', and 'mortgagor' and not 'charge', 'chargee' or 'chargor' as used in the Act and the Code. This I think reflects the clear intention of the legislature to make section 16 of the Limitation Act inapplicable to a pre-existing interest of a mortgagee in possession.

It is noticeable in the record that the deceased mortgagee and the defendants who are members of the deceased family have been in occupation of the land as mortgagees in possession since 1942 and that they had neither received payment for the principal or interests of the mortgage debt nor did they acknowledge the plaintiff's title in accordance with section 27 of the Limitation Act.

The application by the plaintiff failed because firstly, the right of the defendants as administrators of the mortgagee in possession has not been extinguished and still subsists, and secondly, because the plaintiff's right to redeem his land has been barred by section 16 of the Limitation Act.

This application is dismissed with costs.

Application dismissed.

Solicitors: *Vohrah & Tan Chee Lan; Lee Kong Fee & Co.*